



FH  
[REDACTED]

**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

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In the Matter of

[REDACTED]

DECISION

CWT/143415

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**PRELIMINARY RECITALS**

Pursuant to a petition filed August 24, 2012, under Wis. Admin. Code §HA 3.03, to review a decision by the Bureau of Long-Term Support in regard to Medical Assistance (MA), a telephonic hearing was held on October 09, 2012, at Racine, Wisconsin.

The issue for determination is whether petitioner meets the requisite level of care under the Children's Long Term Support Waiver and the Family Support Program.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]

Respondent:

Department of Health Services  
1 West Wilson Street  
Madison, Wisconsin 53703

By written submission: Barbara Behrend, MS, RN, Nurse Consultant  
Bureau of Long-Term Support  
1 West Wilson  
PO Box 7851  
Madison, WI 53707-7851

**ADMINISTRATIVE LAW JUDGE:**

Kelly Cochrane  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a resident of Racine County.

2. Petitioner is a 12-year old boy who is diagnosed with epilepsy with petite mal seizures, migraines, Osgood-Schlatter Disease and flat feet.
3. Petitioner is independent in all of his Activities of Daily Living (ADLs), but does require oversight when he showers in case of a seizure. He is able to ambulate independently and communicate his wants and needs. When he does have a seizure, he can often sense it coming on. The seizures and migraines cause him pain and often cause his mood to change to anger.
4. Petitioner attends school through the Burlington School District in a regular education classroom with support from a special education teacher. His Individualized Education Plan (IEP) showed that for the 5<sup>th</sup> grade Wisconsin Knowledge and Concepts Exam his reading skills were in the proficient range and math was in the advanced range. This was consistent with his performance in 4<sup>th</sup> grade, which reported proficient skills in reading, language arts, and science, and advanced skills in math and social studies. On October 20, 2011 the Woodcock-Johnson III Normative Update of Tests of Cognitive Abilities and Tests of Achievement reported a general intellectual ability score of 101. Petitioner's attendance at school has brought his grades down; however, he does complete the missing assignments and is not failing.
5. On July 16, 2012, petitioner applied for coverage under the Children's Long Term Support Waiver and the Family Support Program.
6. By letter dated July 30, 2012, the agency advised petitioner that his application had been denied for failure to meet requisite level of care.

### DISCUSSION

The various community waiver programs offered under Wisconsin's Medical Assistance (MA) are designed to allow the state to realize savings by providing services in the community to recipients who might otherwise be institutionalized. Applicants for these programs must meet the financial and non-financial requirements for MA coverage and must also require a level of care comparable to that offered in intermediate care facilities, nursing homes or other institutions. See *Medicaid Eligibility Handbook (MEH)*, §28.1, available online at <http://www.emhandbooks.wisconsin.gov/meh-ebd/meh.htm>.

Petitioner in this case was found to be ineligible for the Children's Long Term Support Waiver and the Family Support Program because he did not meet the requisite level of care. The levels of care (LOC) are described in detail in the Wisconsin Department of Health Services *Medicaid Home & Community Based Services Waiver Manual, Appendix A-10: Institutional Levels of Care—Children's Long Term Support Programs in Wisconsin* (updated February 2011)(LOC), available online at [http://www.dhs.wisconsin.gov/bdds/waivermanual/CLTS\\_LOC.pdf](http://www.dhs.wisconsin.gov/bdds/waivermanual/CLTS_LOC.pdf). Four levels of care are described: Intermediate Care Facility, Psychiatric Hospital, Nursing Home and Hospital.

The **Intermediate Care Facility Level of Care** requires that the child meet three criteria:

1. The child has a diagnosis of a **Cognitive Disability** that substantially impairs learning and that is expected to continue indefinitely; and
2. The child demonstrates **Substantial Functional Limitations** when compared to age appropriate activities that are expected to last a year or longer; and
3. The child has the **Need for Active Treatment**.

LOC at p.3 (emphasis in original).

The first criterion requires that the child must have a diagnosis of Cognitive Disability (i.e. Mental Retardation) or a similar diagnosis that substantially impairs learning. Petitioner does not have such a

diagnosis. The second component of the first criterion is that the diagnosis results in the child having substantial learning impairments. Substantial learning impairments are measured by:

1. A 30% (25% if the child is under one year of age) or greater delay in aggregate intellectual functioning, based on valid, standardized and norm referenced measures of aggregate intellectual functioning; OR
2. A score of at least 2 (1.5 if the child is under one year of age) standard deviations below the mean on valid, standardized and norm referenced measures of aggregate intellectual functioning.

*LOC* at p. 3-4. The record does not contain any information to suggest that petitioner was experiencing a 30% or greater delay in aggregate intellectual function or a score of at least two standard deviations below the mean in aggregate intellectual functioning. The record in this appeal indicates that petitioner does not have a cognitive disability *that substantially impairs learning*. The measurements required under the first criterion were not met and the Division of Long Term Care properly determined that petitioner did not meet the Intermediate Care Facility Level of Care.

The **Psychiatric Hospital Level of Care-Severe Emotional Disturbance** has four criteria, all of which must be met. They are:

1. The child has a **Diagnosis** of a mental health condition; and
2. The child's mental health diagnosis or symptoms related to the diagnosis have existed and are expected to persist for a specific **Duration** of time; and
3. The child is in need of **Involvement with Service Systems** related to mental health support; and
4. The child exhibits **Severe Symptomology or Dangerous Behaviors** at a specific intensity and frequency of required interventions such that without this direct, daily community-based intervention, the child is at risk for institutionalization within a psychiatric hospital.

*LOC* at 8 (emphasis in original). In considering the Psychiatric Hospital Level of Care, it is sufficient to note that the fourth criterion requires that the patient demonstrate psychotic symptoms, suicidality, violence, anorexia/bulimia, or dangerous behaviors. Nothing of this nature appears on the record and petitioner does not meet the Psychiatric Hospital Level of Care.

The **Nursing Home Level of Care-Physical Disabilities** has two criteria, both of which must be met. They are:

1. The child has a **Diagnosis** of a medical/physical condition resulting in needs requiring long term care services; and
2. The child requires skilled **Nursing Interventions and/or has Substantial Functional Limitations** requiring hands on assistance from others throughout their day.

*LOC* at 22 (emphasis in original). It is sufficient here to examine the list of skilled nursing interventions that will qualify under the second criterion. They include IV access, tracheostomy care, oxygen, total parenteral nutrition, tube feedings, dialysis, respiratory treatments, wound or special skin care, bowel or ostomy care, urinary catheter and six or more weekly sessions of physical, occupational or speech therapy. *LOC* at 23. None of these interventions are indicated in the record. The supervision while he is in the shower does not rise to the level of a skilled nursing intervention, and petitioner does not meet the Nursing Home Level of Care.

The **Hospital Level of Care-Physical Disabilities** is applicable when

1. The child needs **Frequent and Complex Medical Care** that requires the use of equipment to *prevent life-threatening situations*; and
2. The child's complex skilled medical interventions are expected to persist for a specific **Duration** of time; and
3. The child's overall health condition must require **Continuous Assessment of an Unstable and Life-Threatening Condition**.

*LOC* at 29. In the first criterion for this level of care, the child must require complex skilled medical care, which includes tracheostomy care, ventilator care, IV access, oxygen, total parenteral nutrition, a rehabilitation program for brain injury or coma and dialysis. *Id.* Again, there is no indication on this record that petitioner requires any care at this level; petitioner does not meet the Hospital Level of Care.

At this point, it would be useful to return to the overall purpose that is to be served by the community waiver programs: to provide care in the community for children who would otherwise be hospitalized or placed in some other institutional setting. The waiver programs are therefore intended to serve a constituency which has impairments that are sufficiently severe as to require the level and intensity of services that would normally be available in a hospital or institutional setting. While I do not doubt that petitioner's condition is a source of ongoing concern for his family, teachers and health care providers, it is evident to me that petitioner does not meet any of the applicable levels of care and that he is not eligible for coverage under the waiver programs for that reason. Should his conditions change, he is always free to reapply. I also add, assuming petitioner feels that this is not a fair determination, that I do not have equitable powers and cannot deviate from what law and policy dictate. See Oneida County v. Converse, 180 Wis.2d 120, 125, 508 N.W.2d 416 (1993).

### **CONCLUSIONS OF LAW**

The agency correctly determined that petitioner's condition did not meet any of the levels of care required for coverage under the Children's Long Term Support Waiver and the Family Support Program.

**THEREFORE, it is**

**ORDERED**

That the petition for review herein be and hereby is dismissed.

### **REQUEST FOR A REHEARING**

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

### **APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

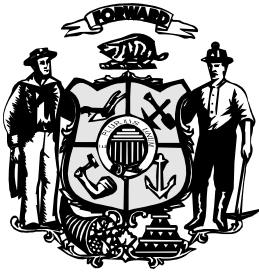
The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,  
Wisconsin, this 31st day of October, 2012

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Kelly Cochrane  
Administrative Law Judge  
Division of Hearings and Appeals

c: DHSDHABLTs@wisconsin.gov, DHSDHABLTs@wisconsin.gov - Long-Term Support



**State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on October 31, 2012.

Bureau of Long-Term Support